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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

April 1, 1996

BY HAND

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Comments in CS Docket No. 96-46

Dear Mr. Caton:

Enclosed please find the original and four copies of the comments of the National Broadcasting Co., Inc. in CS Docket No. 96-46, Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems.

In addition one copy has been hand-delivered to Larry Walke of the Cable Service Bureau and the Commission's copy contractor as required by the Notice of Proposed Rulemaking in this docket.

Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Kathy D. Smith

Kathy D. Smith

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Implementation of Section 302 of
the Telecommunications Act of 1996

Open Video Systems

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CS Docket No. 96-46

COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

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April 1, 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
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Open Video Systems)	

COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

National Broadcasting Company, Inc. ("NBC") by its attorneys files these comments in the above-captioned Notice of Proposed Rulemaking ("NPRM") to implement Section 302 of the Telecommunications Act of 1996^{1/} regarding open video systems.

The NBC Television Network provides high-quality broadcast programming to over 200 owned and affiliated stations across the country. In addition, NBC owns or has an interest in a number of national cable programming services. NBC's comments in this proceeding will address issues of particular importance to NBC as a broadcaster and a programmer unaffiliated with any telephone company.

I. Background

Section 302 is one of the major provisions of the Telecommunications Act, replacing the former cable-telephone company cross-ownership prohibition with law authorizing a local telephone company to provide video programming directly to subscribers in its local telephone service area. This section

^{1/} Pub. L. No. 104-104, 110 Stat. 56 (1996).

permits a local telephone company to provide video programming as a cable operator subject to Title VI of the Communications Act, a wireless cable provider subject to Title III, or under a new hybrid regulatory scheme for "open video systems." The Congress directs the Commission to establish rules implementing this section within 6 months of the date of enactment.^{2/}

Although Section 302 has been widely and properly heralded as one of the most aggressively pro-competitive and deregulatory provisions of the Telecommunications Act of 1996, it is extremely significant that Congress orders the Commission in Section 302 to prescribe new regulations providing very strong safeguards for broadcasters on open video systems. By applying and strengthening the crucial safeguards for broadcasters contained in the 1992 Cable Act to open video systems, Congress reaffirmed the paramount public policy importance of preserving universal, free, over-the-air broadcast television and preventing anti-competitive behavior by multichannel video programming providers.^{3/} These safeguards are intended to effectuate the goals of guaranteeing the universal availability of local broadcast signals to viewers; ensuring easy accessibility of broadcast signals by consumers regardless of the medium bringing them into the home; and promoting competition in the multichannel

2/ See 47 U.S.C. §§ 571, 573.

3/ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1461-62 (1992).

video programming market while protecting unaffiliated programmers from discrimination.

Thus, the new law imposes the must carry and retransmission consent provisions of the 1992 Cable Act on open video systems so that all local broadcast stations will be universally available and easily accessible to all subscribers of these systems. In addition, it contains strong new requirements to ensure that consumers will have the same easy access to broadcast stations in the potentially 200 to 500 channel open video system world as they do today on cable. Under these new access safeguards, an open video system operator ("OVS operator"): (1) cannot discriminate against a broadcaster or unaffiliated programmer in favor of an affiliated programmer in the way that material or information is provided to subscribers about available programming; (2) cannot omit television broadcast signals or unaffiliated programming carried on its system from any on-screen program guide or menu; and (3) must ensure that broadcasters and other copyright holders are able to identify their programming, and if such identification is carried as part of the programming signal, an operator must transmit it without alteration.^{4/} The new law explicitly permits broadcasters and unaffiliated programmers to negotiate with OVS operators for placement on any level or screen of a program guide or gateway to ensure easy consumer access to their signals.^{5/} Congress also directs the

4/ See 47 U.S.C. § 573(b)(1)(E).

5/ See 47 U.S.C. § 573(b)(2).

Commission to apply its network non-duplication, syndicated exclusivity, and sports exclusivity rules to open video systems.^{6/}

II. Universal Availability of Broadcast Signals

Section 302 requires the Commission to prescribe regulations imposing the must carry and retransmission consent provisions of the 1992 Cable Act on OVS operators in a manner commensurate with cable operators.^{7/} This section acknowledges that there are no public policy reasons to justify treating an OVS operator differently from a cable system operating in the same local market for purposes of broadcast signal carriage.^{8/} The Commission seeks comment on a wide variety of issues regarding the implementation of must carry and retransmission consent obligations on open video systems.^{9/}

A. Must Carry

To effectuate the mandate of subsections 653(c)(1)(B) and (2)(A) with regard to must carry, the Commission should amend its

6/ See 47 U.S.C. § 573(b)(1)(D).

7/ See 47 U.S.C. § 573(c)(1)(B) and (2)(A). Subsection 653(c)(2)(A) requires that the must carry and retransmission consent rules for OVS operators be to the extent possible, "no greater or lesser than" obligations on cable operators. 47 U.S.C. § 573(c)(2)(B).

8/ OVS operators with systems covering more than one ADI (DMA) should be treated no differently than the Commission's rules treat a cable system that serves more than one ADI, *i.e.*, all qualified must carry stations in both ADIs must be carried unless the cable operator has the technical ability to offer different stations in different ADIs.

9/ See NPRM at ¶¶ 59-60.

carriage rules for local commercial stations (47 C.F.R. §§ 76.55 - 76.62) to cover OVS operators as cable operators are currently covered, including the specific rules for signal availability, content to be carried, signal quality, channel positioning, and notice regulations. The 1992 Cable Act requires that all must carry signals be "provided to every subscriber of a cable system."^{10/} The same requirement should apply to all open video systems.

The channel positioning rule^{11/} is also critical to ensure that consumers will readily and easily be able to find and access local broadcast stations in the new 200 to 500 channel world. A broadcast station carried pursuant to must carry on an open video system in most instances should be able to obtain carriage on its numbered channel as required by the current rule for cable.^{12/}

B. Retransmission Consent

Subsection 302 also requires the Commission to implement regulations imposing retransmission consent obligations on OVS operators equivalent to those imposed on cable operators. To effectuate this mandate, the Commission should amend its current retransmission consent rules (47 C.F.R. § 76.64) to include OVS operators. Furthermore, to preserve the ability of broadcasters

^{10/} See 47 U.S.C. § 534(b)(7).

^{11/} See 47 C.F.R. § 76.57.

^{12/} Because subsection 653(b)(1)(A) requires the Commission to except from must carry requirements from its non-discrimination rules, the Commission should make it clear that channel positioning obtained pursuant to must carry does not violate the prohibition against non-discrimination.

to negotiate freely for compensation, channel position on the system, position on any electronic program guide, menu, or screen as permitted by new subsection 653(b)(2),^{13/} carriage by the OVS operator of additional programming or services, or other rates, terms and conditions of a retransmission consent agreement, the anti-discrimination rules adopted pursuant to subsection 653(b)(1)(A) should explicitly except the rates, terms and conditions contained in a retransmission consent agreement. The terms of retransmission consent agreements with cable operators are not regulated by the Commission under current rules. Therefore, the only way to effectuate broadcasters' rights embodied in Section 325 of the Communications Act and to fashion rules governing retransmission consent in the open video system context that impose "no greater or lesser" obligations than cable operators bear is to exempt the terms and conditions of retransmission consent agreements with OVS operators from the non-discrimination rules the Commission adopts.

NBC believes that to effectuate the plain meaning and intent of Congress in imposing must carry, retransmission consent and access safeguards on open video systems, the Commission's rules should ensure that the signals of all television broadcast stations remain as readily available and as easy for consumers to access as they are today. One way to achieve these goals in this rulemaking would be to require that all broadcast signals, whether carried pursuant to must carry (and subject to strict

^{13/} See 47 U.S.C. § 573(c)(2).

consumer availability requirements under Section 614(b)(2) of the Communications Act) or retransmission consent, be contained in a basic package provided to all subscribers of the OVS operator. In a 200 to 500 channel world, the only way to ensure continued universal availability of broadcast signals would be to require a broadcast basic package on an open video system comparable to the broadcast basic tier in cable today. Moreover, if broadcast stations are part of more than one programming package on an open video system and are carried on shared channels, then the Act requires that consumers have "ready and immediate access" to these channels.^{14/} A rule requiring a basic broadcast package would satisfy this statutory requirement.^{15/}

In the alternative, if the Commission does not require a broadcast basic package on an open video system, then the Commission must ensure that the new rules do not contain any restrictions that would impair the ability of broadcasters who opt for retransmission consent to negotiate for the creation of a broadcast basic package or for inclusion in any grouping of broadcast stations (whether must carry or retransmission consent) created by the OVS operator. Congress specifically preserved the full rights of broadcasters under retransmission consent in

^{14/} NBC strongly supports the Commission's conclusion that "each video provider that wants to provide a program service to subscribers that will be carried on a shared channel must first obtain permission from the program service to do so." NPRM at ¶ 41 (emphasis added). This conclusion is essential to preserve the retransmission consent rights of broadcasters and the rights of copyright holders.

^{15/} See 47 U.S.C. § 653(b)(1)(C).

Section 653(c)(1)(B) and the Commission's new rules should not abrogate these rights in any way.

C. Allocation of Channel Capacity to Broadcast Stations

Subsection 653(b)(1)(A) of the new law directs the Commission to establish rules that prohibit an OVS operator "from discriminating among video programming providers with regard to carriage on its open video system" except as provided pursuant to public, educational or governmental use under section 611 or must carry under sections 614 and 615 of the Communications Act.^{16/} The Commission seeks comments on a number of issues regarding channel allocation for broadcast carriage on open video systems.^{17/}

The Commission specifically seeks comment on allocation procedures when carriage demand exceeds capacity and the impact of must-carry obligations on this process.^{18/} NBC supports the Commission's position that must-carry stations should not be counted toward the one-third capacity that an OVS operator can select when carriage demand exceeds capacity. Moreover, NBC believes that the Commission's rules should also exclude broadcast stations carried pursuant to retransmission consent from the one-third limitation. If an OVS operator were required under the rules to count retransmission consent stations against its one-third capacity allocation, but not must carry stations,

^{16/} See 47 U.S.C. § 573(b)(1)(A).

^{17/} See NPRM at ¶¶ 19-27.

^{18/} NPRM at ¶¶ 19, 24.

then clearly the rules would create a marked disincentive for an OVS operator to negotiate for retransmission consent. Equivalent treatment is necessary if the election between must carry and retransmission consent is to have any meaning in the open video system context. Furthermore, because must carry and retransmission consent stations will likely appear on shared channels in situations in which carriage demands have exceeded capacity, it would be unfair to count broadcast stations on shared channels only in the capacity limits for OVS operators since other program packagers will clearly have the benefit of this capacity as well.

With regard to channel allocation procedures other than for local broadcast signals, the Commission's rules should permit OVS operators to determine the method of allocating the remaining two-thirds capacity when demand exceeds capacity, subject to the prohibition against discrimination. Each OVS operator should determine which method of allocating capacity to unaffiliated programmers is the most appropriate in that market, and programmers seeking access to such capacity should be able to negotiate terms and conditions of carriage based on their individual needs rather than an arbitrary regulatory formula.

The Commission also seeks comment regarding notice to programming providers that would seek carriage on an OVS system.^{19/} The new rules should require an OVS operator to provide broadcasters and unaffiliated programmers with sufficient

^{19/} NPRM at ¶ 14.

notice that it intends to establish an OVS system so that broadcasters and programmers can seek carriage or capacity on the system in a timely fashion. This is particularly important given the abbreviated 10-day time frame in which the Commission has to approve or reject an OVS operator's certification request.^{20/}

The Commission specifically seeks comment on an OVS operator's allocation of analog and digital capacity to other video programming providers.^{21/} The Commission's rules implementing this section should require an OVS operator to provide any broadcast station, whether carried on the open video system pursuant to must carry or retransmission consent, with a full 6 MHz of analog capacity as long as that broadcast station broadcasts an analog signal.^{22/}

The Commission also seeks comment on whether an OVS operator's allocation of lower-numbered channels to itself or its affiliate would constitute impermissible discrimination under

20/ See 47 U.S.C. § 573(a)(1).

21/ NPRM at ¶ 21.

22/ NBC notes that the issue of broadcast signal carriage by cable operators both during and after the transition to ATV is currently one of the subjects of the Commission's ongoing ATV proceeding. See Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service, Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, MM Docket No. 87-268, 10 F.C.C. Rcd. 10540, 10552-554 (1995). At a minimum, the carriage obligations the Commission imposes on cable operators should be applied to OVS operators. To the extent that open video systems will have greater channel and technical capacity than current cable systems, the Commission may require even broader carriage obligations.

this subsection.^{23/} NBC believes that such allocation of lower numbered channels should be prohibited under the new rules as impermissible discrimination to the extent that an OVS operator's allocation of low-numbered channels to itself or its affiliate would violate the channel positioning rules of must carry or infringe upon the ability of a broadcaster to negotiate channel positioning under retransmission consent.

III. Easy Accessibility to Broadcast Signals

Subsection 653(b)(1)(e) requires the Commission to adopt regulations that provide strong safeguards to guarantee consumer access to broadcast signals carried on open video systems. NBC agrees with the Commission's conclusion that Congress intended the provisions of subsection 653(b)(1)(E) to prevent an OVS operator from providing itself with advantages over broadcasters and other unaffiliated programmers on an open video system in the way that consumers have access to these services.^{24/} These access safeguards are particularly critical to free, over-the-air broadcasters who are dependent upon reaching a mass audience in to support their continued existence. In enacting these safeguards, Congress clearly recognized that unlike other services that are supported by direct payments from subscribers, an advertiser-supported mass media, like television broadcasting, must have unimpeded access to the entire audience to compete.

23/ NPRM at ¶ 22.

24/ NPRM at ¶ 48.

Specifically, subsection 653 (b) (1) (E) (i) provides that an OVS operator is prohibited "from unreasonably discriminating in favor of the operator or its affiliates with regard to material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming on the open video system or in the way such material or information is presented to subscribers."^{25/} The Commission requests comment about the scope of this subsection and about its relationship to subsection 653 (b) (1) (E) (iv) which prohibits an OVS operator from omitting any television broadcast station or unaffiliated programming carried on the system from any navigational device, guide or menu.^{26/}

These provisions make it clear that Congress intended the Commission's rules to guarantee that consumers have easy access to broadcast signals carried on open video systems and to prohibit OVS operators from marketing their own services, configuring their systems, or manipulating their on-screen or printed program guides in such a way as to hinder consumers' access to broadcast signals or to disfavor unaffiliated programmers' services. To implement subsection 653 (b) (1) (E) (i), the Commission should require an OVS operator to offer local broadcast stations carried on the system as part of its basic service to subscribers and to provide information about these services prominently in both written materials and on electronic

^{25/} 47 U.S.C. § 573 (b) (1) (E) (i).

^{26/} NPRM at ¶ 49.

guides or menus. The rules should prohibit an OVS operator from constructing its navigation device or programming guide to default automatically to an affiliated service, such as the channel that advertises the OVS operator's owned services, each time a television set is turned on. Moreover, the rules should provide that a consumer should be able to access local broadcast channels without complex interaction with an electronic guide or navigation device. Consumers should not have to scroll through several screens or make more than one click of a mouse or remote control before they can identify and access their local broadcast stations.

The Commission also seeks comment on whether the rules implementing subsection 653(b)(1)(E)(iv) should require an OVS operator to include on any on-screen menu or navigation device every broadcast station or unaffiliated programming service carried on the open video system even if it is not part of a subscriber's package.^{27/} NBC believes that the only way to give full force and effect to the subsection's prohibition against "omission" is to adopt a rule that requires an OVS operator to include in every menu or guide all broadcast stations and unaffiliated programmers carried on the open video system whether or not these programming services are part of a subscriber's package. To ensure that consumers are aware of the availability of these services, they must be informed through the on-screen

27/ NPRM at ¶ 50.

guide that these signals are carried on an open video system regardless of the programming package in which they appear.

In terms of the placement of broadcast stations and unaffiliated programming within the open video system's navigational system, subsection 653(b)(2) requires that broadcasters and unaffiliated programmers be permitted to negotiate with an OVS operator or its affiliate for mutually agreeable terms and conditions to allow consumers to access their programming from any level or screen of any gateway, menu or other program guide.^{28/} This subsection is particularly important because it directs the Commission to ensure that nothing in its open video system rules impairs the ability of local broadcast stations or unaffiliated programmers to engage in free market negotiations with OVS operators for particular placement on the system's program guide. This stricture is critical to the preservation of a broadcaster's full rights to negotiate freely under retransmission consent for placement on an open video system's program guide.

The Commission also seeks comment on subsections 653(b)(1)(E)(ii) and (iii) which require that an OVS operator ensure that video programming providers or copyright holders are able to "suitably and uniquely" identify their programming services to subscribers and if such identification is carried as part of the signal, require the operator to carry it without

^{28/} See 47 U.S.C. § 573(b)(2).

alteration.^{29/} The Commission's rules should define "suitable and unique" identification to include station call letters, or a station or programming brand or logo, e.g., "NBC 4" or "CNBC." Consumers readily identify local broadcast stations and cable services by these brands and select programming based on this identification. Therefore, the Commission's rules implementing this section should require an OVS operator to transmit a station or programming brand as part of the signal, to include it on any on-screen electronic guide or menu, and to publish it in any paper guide.

IV. Sports Exclusivity, Network Non-Duplication, and Syndicated Exclusivity

Subsection 652(1)(D) requires the Commission to extend its rules regarding sports exclusivity (47 C.F.R. 76.67), network nonduplication (47 C.F.R. § 76.92 et seq.), and syndicated exclusivity (47 C.F.R. § 76.151) to open video systems.^{30/} The Commission seeks comment regarding implementation of these provisions, particularly with respect to open video systems that cover more than one geographic zone and enforcement of these rights.^{31/}

To implement this section, the Commission should amend its current rules to include coverage of OVS operators without altering the rules with regard to geographic zones. The

^{29/} NPRM at ¶ 51.

^{30/} See 47 U.S.C. § 573(b)(1)(D).

^{31/} NPRM at ¶ 46.

potential geographic configuration of an OVS operator's system should in no way be permitted to diminish a broadcaster's rights under these rules. The rules should permit a broadcaster to give notice only to the OVS operator that it will enforce its rights under these rules and the OVS operator should be responsible for blocking the appropriate programming for its own package and that of other programming providers carried on the OVS system. An OVS operator will have unique access to the system's blocking capability, and in all likelihood, any broadcast signal carried in another programming provider's offering will be carried on a shared channel with the OVS operator.

Conclusion

In adopting rules to implement Section 302 of the Telecommunications Act of 1992, the Commission should be guided by Congress' clear desire to: (1) apply the cable signal carriage requirements of must carry and retransmission consent to OVS operators so that broadcast stations will continue to be universally available to all viewers; (2) assure all viewers easy access to local broadcast signals on open video systems; and (3) promote competition in the multichannel video programming market by protecting unaffiliated programmers from discriminatory practices.

Respectfully submitted,

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